IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/03/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

A.S.NO.466 OF 1988

1. Govindaraj & Co.

2. R. Govindarajan .. Appellants

-Vs-

1. The Nedungadi Bank Ltd.,
a registered Banking Company
having its Head Office at
Calicut, Kerala State
and a Branch at
Oppanakara Street
Coimbatore-641 009

2. The Nedungadi Bank Ltd.,
a registered Banking Company
having its Head Office at
Calicut, Kerala State
and a branch at
Kandanesseri,
Trichur District
Kerala State

3. The Nedungadi Bank Ltd.,
a registered Banking Company
having its Head Office at
Calicut, Kerala State
and a branch at Palghat
Marude Road
Palghat District
Kerala State .. Respondents

This appeal is preferred under Section 96 of C.P.C. against the
decree and judgment of the learned Subordinate Judge, Coimbatore dated 30
.9.1987 made in O.S.No.674 of 1980.

!For Appellants : Mr.N.Varadarajan

^For Respondents : Mr.T.V.Sekar
for Mr.D.Soouza

:JUDGMENT

M. CHOCKALINGAM, J
The first and second defendants are the appellants herein.
2. This appeal has arisen from the judgment and decree of the learned Subordinate Judge, Coimbatore granting a decree in favour of the first respondent/plaintiff.
3. The case of the plaintiff as set out in the plaint is as follows:
The first defendant is a partnership firm and the defendants 2 and 3 are the partners of the first defendant firm. On 5.7.1979 a crossed demand draft for a sum of Rs.65,063/- in favour of the first defendant firm was received by the plaintiff for clearance through Canara Bank, Headquarters Road Branch, Coimbatore. The Canara Bank received the payment and endorsed the same by affixing its rubber stamp. The first defendant has withdrawn the amount from Canara Bank. On 22.8.1979 , the first defendant attempted to encash another Demand Draft, and it was found that the demand draft was a forged one and had been tampered with. Canara Bank Branch Manager of Head Quarters Road branch telephoned the plaintiff's branch Manager about this incident and asked the plaintiff's Branch Manager to scrutinise the suit demand draft cleared by the plaintiff. On careful scrutiny, the plaintiff's Branch Manager suspected material alteration of the instrument. It was clear that the date, the name of the payee, the amount of the draft, the names of the drawer and drawee had all been tampered with and materially altered by some chemical process in an ingenious manner. A complaint has been lodged with the police on 25.8.1979. After investigation, the second defendant was arrested and the police recovered Rs.31,00 0/-. The said amount has been paid to the plaintiff. The police were in search of others. The first defendant had no title to the instrument. The first defendant who had drawn the amount from the Canara Bank is liable to pay back the amount, and the plaintiff is entitled to recover the amount from the first defendant. Out of Rs.65,063/-, the plaintiff has received through police Rs.31,000/-. The suit is filed to recover a sum of Rs.39001.18 with interest at 18% per annum from the date of plaint till realisation.
4. The suit was resisted by the the first and second defendants by filing a written statement with the following averments:
The first defendant company is not a partnership company. The third defendant is not a partner of the first defendant firm. It is admitted by the second defendant that he received a Demand Draft in the name of the first defendant company for Rs.65,063/-. The said demand draft was also encashed by the Canara Bank from the plaintiff Bank and was given credit to in the account of the first defendant Company. The defendants 1 and 2 never had a hand in any manner at any time in the alleged forgery of the said demand draft. The said demand draft is not a forged one. The plaintiff is bound to prove that it did not receive the advice slip from the drawer bank at least till 25.8.1979. During May, 1979, one Krishnakumar along with broker Sami approached the first defendant and he was introduced to the second defendant. The second defendant gave him the proforma invoice and informed that without

receiving the amount, he cannot supply the materials. Hence, the said Krishnakumar issued a demand draft for Rs.65,063/- and it was sent for collection. Later, the said Krishnakumar placed with the second defendant a second order for the supply of electrical motors and pump sets for the amount of Rs.65000/- and sent a demand draft. This demand draft was found to be a forged one and a police complaint was given. The police examined the second defend ant and Krishnamoorthy Mudaliar and they informed the police of the first demand draft that was encashed. Only on the information given by the second defendant, the plaintiff probed into the matter and found that the first demand draft was also materially altered. The second defendant was not arrested by the police. Only Sasi was arrested and remanded by the police. The defendants 1 and 2 are not liable to pay any interest on the amounts claimed as there was no agreement to pay any interest nor was there any privity of contract between them. The suit is bad for non joinder of necessary parties. Hence, the suit has to be dismissed with costs.

5. The written statement filed by the fifth defendant was adopted by the fourth defendant.

6. The fifth defendant has filed a written statement alleging that the 5th defendant is an unnecessary party to the suit; that no relief can be claimed against them; that they are entitled to costs from the defendants 1 and 2 and that the suit has got to be decreed as prayed for against the defendants 1 and 2.

7. On the above pleadings, the trial Court framed as many as five issues and one additional issue and tried the suit. After considering the rival submissions and the oral and documentary evidence, the learned Subordinate Judge granted a decree for a sum of Rs.34,063/- with subsequent interest. Aggrieved defendants 1 and 2 have brought forth this appeal.

8. The subject matter of this appeal is the decree granted in favour

of the first respondent/plaintiff directing the appellants/ defendants 1 and 2 to pay to the plaintiff a sum of Rs.34,063/- with subsequent interest and proportionate costs.

9. Arguing for the appellants, the learned Counsel would submit that the trial Court has not considered the oral and documentary evidence in entirety; that it is pertinent to note that the amount paid to the Canara Bank under the suit Demand Draft was due to the gross negligence and carelessness of the plaintiff Bank; that the defendants 1 and 2 are bonafide holders for value; that it has to be noted that the original draft alleged to have been forged and materially altered has not been produced, and in the absence of the same, the suit is not maintainable; that Exs.A5 and A6 are inadmissible in evidence, as the photographer who took photos of the same, has not been examined and the negatives also have not been produced; that it is not proved by the plaintiff that the original draft was for Rs.16.50 and the payee was one Krishnalal Bhuvandas; that in spite of notice, the application for the issue of the draft has not been produced; that it was the plaintiff who was negligent and careless in paying the amount; that in any event both the plaintiff and the defendants 1 and 2 were victims of a fraud played by a third party and thus, the money paid by the plaintiff could not be recovered back; that there is no absolute liability to refund the amount received under a

draft found to be materially altered; that in any event, the plaintiff was entitled to sue and recover the amount only from the Canara Bank and not from the appellants; that the suit without impleading the Canara Bank is bad for nonjoinder of a necessary party; that in spite of summons, the entire records of the appellants which were seized by the police during investigation, have not been produced; that in view of the available evidence, the trial Court ought to have rejected the case of the plaintiff, and hence, the judgment and decree of the lower Court have got to be set aside and the appeal be allowed.

10. The learned Counsel appearing for the respondents would submit that the trial Court only after careful scrutiny of the entire evidence came to the conclusion that the defendants 1 and 2 were liable to answer the suit claim; that there was no negligence on the part of the plaintiff, but it was the appellants, who cleverly placed the Demand Draft for collection through their Bank namely Canara Bank; that only when the appellants attempted to encash another forged Demand Draft on 22.8.1979, there arose a necessity to probe into the transaction under the Demand Draft in question; that after enquiry, it was found that the suit Demand Draft was materially altered and tampered with; that the plaintiff has proved the suit cla im by adducing sufficient and acceptable evidence both oral and documentary; that the lower Court was correct in holding that the appellants are not bonafide holders for value; that the original Demand Draft could not be produced, since the same was in the hands of the police during investigation; that the plaintiff has produced copies of the instrument; that the nonproduction of the original Draft would not in any way affect the case of the plaintiff; that it is pertinent to note that the appellants have well admitted in their written statement that the suit demand draft was found to be materially altered; that the lower Court was right in decreeing the suit, and there is nothing to interfere with the impugned judgment, and hence, the appeal has got to be dismissed.

11. Admittedly, the second defendant is the proprietor of the first defendant concern dealing in engineering goods like textile machineries, electric motors, etc., and had an account with the Canara Bank at Headquarters Road, Coimbatore. A Demand Draft purported to be in the name of the first defendant Company for Rs.65,063/- dated 4.7.1979 bearing No.831718 and drawn by the Nedungadi Bank, Trichur Kandassery Branch and drawn on the Nedungadi Bank, Oppanakara Street, Coimbatore was placed with the first defendant's Banker namely Canara Bank, Coimbatore for collection. The said crossed Demand Draft was also encashed by the Bank of the first defendant from the plaintiff Bank and was given credit to in the account of the first defendant Company, and the amount borne by the said Demand Draft namely Rs.65,063/- was withdrawn by the second defendant on behalf of the first defendant. Out of the said amount, the plaintiff realised a sum of Rs.31,000/- from the defendants 1 and 2 through police.

12. As seen above, the plaintiff Bank laid the said civil action for the recovery of the balance sum of Rs.34,063/- with subsequent interest specifically alleging that on careful scrutiny, the said Demand Draft was found to be materially altered, unsupported by consideration and hence void, and the said amount of Rs.65,063/- was paid to the first defendant's Bank under a mistake of fact bonafide and without the knowledge of any fraud committed on the instrument, and thus, the defendants 1 and 2 who received the amount, had not the title and hence liable to return the same to the plaintiff

Bank. The suit was resisted by the contesting defendants 1 and 2 that the plaintiff has neither produced nor proved the instrument alleged to be tainted with invalidating factor namely forgery; that they had no hands in any manner at any time in the alleged forgery of the said instrument; that on 4 .7.1979 one Krishnakumar has given the said Demand Draft towards the purchase of the machineries pursuant to a purchase order placed by him, and the same was placed in the hands of the first defendant's Banker's namely Canara Bank for encashment; that without the connivance of the staff of the plaintiff namely Nedungadi Bank, the alleged commission of fraud and crime could not have been committed; that the second defendant was a bonafide holder in due course and for value of the said Demand Draft, and hence, the defendants 1 and 2 were not liable to the plaintiff for the loss sustained by them on account of its gross negligence and carelessness. In order to prove its case, the plaintiff has examined P.Ws.1 to 3 and marked Exs.A1 to A12. The defendants have examined D.Ws.1 to 3 and marked Exs.B1 to B15.

13. The first contention raised by the appellants that the plaintiff has not proved the Demand Draft for Rs.65,063/- dated 4.7.1979 bearing No.831718 which is the basis for the suit, as a forged one cannot be countenanced in view of the candid admission made by the defendants 1 and 2 in their written statement. Paragraph 5 of the written statement reads as under:

"...But the 2nd defendant did not know that the said D/D was a forged one till 25th August, 1979 when the plaintiff gave a criminal complaint to police..."

In paragraph 6 of the written statement, it is stated as follows:

"...The demand draft could not have at all come into existence without the stealthy co-operation of some one of the staff of the Nedungadi Bank at Kandanasseri..... The said demand draft is now found to be materially altered..."

In paragraph 11 of the written statement, it is stated as under:

"...During investigation the 2nd defendant came to know that Krishnakumar's real name is Sasi. Sasi admitted before the police that he materially altered the demand draft as well as the previous suit demand draft. Only on the information given by the 2nd defendant, the plaintiff probed into the matter and found that the 1st suit D.D. was also a materially altered."

In view of all the above, it would not be difficult to hold that the suit Demand Draft is a forged one as stated by the plaintiff's side.

14. It was further contended by the learned Counsel for the appellants that the original Demand Draft has not been produced before the trial Court; and that in the absence of the original, the suit to recover the amount on the basis of payment made under the said Demand Draft is not maintainable. It is true that the original of the said forged and materially altered Demand Draft was not produced. But, only xerox copies of the said Demand Draft were filed and marked as Exs.A5 and A6. From the available evidence, it would be abundantly clear that when the said material alterations and forgery were found out, immediately a complaint was lodged by the plaintiff Bank on 25.8.1979, and the original of the forged Demand Draft was in the hands of the police. The copy of the First Information Report has been produced as Ex.A4. The fact that pursuant to the said first information, a case was registered and was investigated, during which connected accused were arrested is not disputed by the appellants. It is also not in dispute that Rs.31,000/- was recovered by the police. Under such circumstances, the original Demand Draft could not be produced before the trial Court. Thus, the

plaintiff was able to place before the Court below the true circumstances, in which the original instrument could not be made available to the trial Court. It remains to be stated that nowhere the defendants 1 and 2 have stated that Exs.A5 and A6 were not the xerox copies of the original Demand Draft. On the contrary, all the contents found under Exs.A5 and A6 were well admitted not only in the course of the written statement filed by the defendants 1 and 2, but also in the evidence of D.W.1. In such case, the non production of the original Demand Draft would not in any way affect the plaintiff's case.

15. Equally so the contention of the appellant's side that the plaintiff has not proved that the original Demand Draft was only for Rs.16 .50, and the payee was one Krishnalal Bhuvandas cannot be accepted. In order to prove those facts, the plaintiff Bank has produced the counterfoil of the Demand Draft bearing No.831718, as found under Exs. A1 from which it would be abundantly clear that the same was drawn on 23.6.1979 by Marutha Road Branch for Rs.16.50 in favour of one Krishnalal Bhandary on the plaintiff's Branch at Purasavakkam, Madras. A comparison of the said counterfoil pertaining to the Demand Draft No.8 31718 and the Demand Draft borne by Exs.A5 and A6 would make it quite evident that the date, the name of the payee, the amount of the Demand Draft and the names of the drawer and drawee all had been tampered with and materially altered. Section 87 of The Negotiable Instruments Act reads as under:

"87. Effect of material alteration:- Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties."

A very reading of the above provision of law would make it clear that material alteration of the negotiable instrument would render the instrument void. In order to avoid the instrument, the alteration should be with regard to the material particulars and should be in such a way which would vary the rights, liabilities or the legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally expressed. In the instant case, the material alteration was by way of insertion of all the above particulars by erasion and alteration.

16. Apart from the oral and documentary evidence adduced by the plaintiff Bank, the defendants 1 and 2 in the course of their written statement have well admitted the material alterations found in the negotiable instrument in question. The fact remains that the second defendant acting on behalf of the first defendant has encashed the said materially altered instrument from the plaintiff Bank through their Banker's namely Canara Bank. It is pertinent to note that the said instrument in view of its material alteration has become void, and it was not supported by consideration as contended by the plaintiff's side. Needless to say that the defendants 1 and 2 cannot claim any title on and over the materially altered instrument, which was void and unsupported by consideration.

17. The Court is unable to see any force in the last contention raised by the appellants' side that the defendants 1 and 2 were not answerable to the loss sustained by the plaintiff Bank in view of the gross negligence and carelessness on the part of the staff of the plaintiff, and without their

connivance, the act of fraud and forgery could not have been committed. Admittedly, the Demand Draft in question was not placed by the second defendant directly before the plaintiff Bank. But, the same was placed in the hands of Canara Bank being the Banker for the defendants 1 and 2 for collection. According to P.W.2 , who served as a Manager of the Nedungadi Bank, Oppanakara Street, Coimbatore, the original of Exs.A5 and A6 Demand Draft with Serial No.831718 D.D.No.174/79 for a sum of Rs.65,063/- was received from the Canara Bank, Coimbatore, and he passed the same, since he did not entertain any suspicion over the document. It remains to be stated that only on 22.8.1979 when the first defendant attempted to encash a Demand Draft from Dhanalakshmi Bank, Coimbatore through their Banker namely Canara Bank, it was found out that the same was a forged one, and a complaint was lodged in that regard. According to P.W.2, when the said incident was brought to the notice of the plaintiff Bank, there arose a necessity to probe into the transac tion covered under the Demand Draft in question. Only after enquiry it was found that the Demand Draft No.831718 was drawn on 23.6.1979 by Marutha Road Branch for Rs.16.50 in favour of Mr.Krishnalal Bhandary on the plaintiff's Branch at Purasavakkam, Madras, and the original Demand Draft was completely tampered with and materially altered in respect of date, name of the payee, amount of the Demand Draft and names of the drawer and drawee in an ingenious manner. Thus, it would be clear that in view of the alterations done cleverly and in an ingenious manner, it is neither visible nor possible to find out the alterations on a normal scrutiny.

18. A difference can normally be drawn between a Demand Draft being paid at the counter to a person in possession thereof and a Demand Draft being paid to another Bank who sought collection for one of its customers. In a case like this where the Demand Draft was placed before the drawee Bank by the collecting Bank, the drawee Bank can act with reliance and assurance that the collecting Bank would have discharged the duty of careful scrutiny of the said instrument and satisfied itself about the title of its customer over the said Draft. Hence, when a Demand Draft is placed for encashment at the counter of a Bank by an unknown person, the Bank has to exercise a better degree of care and discharge its duty in scrutinising and satisfying itself. But, one cannot expect and the law would also not demand the same degree of care and caution, when the Draft is placed for encashment by way of collection by another Bank. In the instant case, it was the Canara Bank, who sent the instrument in question to the plaintiff Bank for collection. Hence, the contention of the appellants' side that the staff of the plaintiff Bank was grossly careless and negligent in passing the Demand Draft cannot be countenanced. Having encashed a materially defective, altered, tampered and void instrument, the defendants 1 and 2 who had no title over the said Demand Draft, cannot at all be permitted to raise a defence stating that the plaintiff Bank was negligent and careless in passing the said instrument. Thus, the Court is unable to see any merit in the appeal so as to interfere with the judgment of the Court below. Therefore, the judgment of the lower Court has got to be sustained, and the appeal is liable to be dismissed.

19. In the result, this appeal is dismissed, confirming the judgment and decree of the lower Court. The parties will bear their own costs.

Index: Yes

Internet: Yes

To:
1) The Subordinate Judge,
Coimbatore.

2) The Record Keeper
V.R.Section
High Court, Chennai.

nsv/